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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND-DELIVERY

Mr. William Caton
Acting Secretary
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1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *In the Matter of Implementation of the Local Competition Provisions in the
Telecommunications Act of 1996; Interconnection between Local Exchange
Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-
98 & 95-185*

Dear Mr. Caton:

Enclosed are an original and 6 copies of the Petition for Clarification or Reconsideration of WinStar Communications, Inc. in the above-captioned matter. Included is a copy to be date-stamped and returned with the courier.

Thank you for your attention to this matter.

Sincerely,

Dana Frix

Dana Frix

Counsel for WinStar Communications, Inc.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

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Provisions in the Telecommunications Act)	
of 1996)	
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Interconnection between Local Exchange)	CC Docket No. 95-185
Carriers and Commercial Mobile Radio)	
Service Providers)	

WINSTAR COMMUNICATIONS, INC.
PETITION FOR CLARIFICATION OR RECONSIDERATION

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In the Matter of)	
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Carriers and Commercial Mobile Radio)	
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**WINSTAR COMMUNICATIONS, INC.
PETITION FOR CLARIFICATION OR RECONSIDERATION**

WinStar Communications, Inc. ("Winstar"), a provider of competitive dedicated and switched local services, by its undersigned counsel, hereby petitions the Commission for clarification or reconsideration of a single aspect of the *First Report and Order* in the above-captioned dockets, FCC 96-325, released August 8, 1996 (the "*Order*").^{1/}

I. INTRODUCTION AND SUMMARY

While the Telecommunications Act of 1996 ("1996 Act") established the initial framework for competition in local exchange markets around the country, the Commission's *Order* successfully translated the broad outline of the 1996 Act into more specific —

^{1/} WinStar provides local telecommunications services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 gigahertz ("GHz") band, a configuration referred to by WinStar as Wireless FiberSM because of its ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions. WinStar's typical installation of 38 GHz equipment has a highly discrete profile. A WinStar "installation" normally is no more than approximately four feet in height, to which several dishes, each of which is approximately the size of a medium pizza, can be attached. No separate power source is needed. This installation is considerably more compact and less intrusive than the typical microwave facilities employed by incumbent LECs as part of their network architecture.

and consequently more worthwhile — rules and regulations. True to its guiding principles, the Commission promulgated rules that are appropriately pro-competition, rather than pro-competitor, and has facilitated the resolution of interconnection negotiations between many new entrants and incumbent local exchange carriers (“LECs”).

This Petition requests that the Commission clarify WinStar’s right, where it operates as a facilities-based competitive local carrier, to locate its 38 GHz microwave equipment on the roof of utility premises and to utilize related riser conduit owned or controlled by the utility, in order to provide competitive local services to end user customers, as well as for purposes of interconnection. Although WinStar believes that the framework for competition outlined in its *Order* clearly provides that incumbent LECs cannot discriminate against a carrier because of the nature of its distribution technology (in WinStar’s case, 38 GHz microwave transmission), incumbent LECs have been reluctant to enter into binding arrangements that would enable WinStar to utilize, at cost-based rates, rooftops and related riser conduit owned or controlled by the incumbent LEC absent clear instruction from the Commission. As demonstrated below, WinStar believes that minor clarification by the Commission would eliminate this very significant barrier to competition and would expedite and simplify interconnection negotiations, thus speeding competition for local services to end user customers.

II. THE COMMISSION SHOULD CLARIFY THAT WIRELESS CARRIERS ARE ENTITLED TO ACCESS ROOFS AND RELATED RISER CONDUIT OWNED OR CONTROLLED BY UTILITIES, INCLUDING INCUMBENT LECS

In its comments in this proceeding, WinStar noted that, in contrast to fiber based carriers, WinStar will utilize technologically unique, state-of-the art 38 GHz transmission equipment as a central component of its transmission and distribution network. Further, as a fixed-point-to-point wireless carrier, WinStar noted that it will need to place its microwave transmission facilities on roofs and utilize related rights of way (most importantly, riser conduit) owned or controlled by utilities, including incumbent LECs.^{2/} In practice, the rights of way utilized by WinStar's fiber based competitors chiefly include pole attachments as well as underground conduit and ducts, through which fiber optic cable is strung. In contrast, local exchange carriers such as WinStar that rely upon wireless microwave facilities have virtually no use for pole attachments or underground conduits or ducts, precisely because their transmission facility avoids the need for these conventional right of way obstacles.

In its *Order* the Commission interpreted in substantial detail the broad nondiscriminatory access requirements of Section 224(f)(1) which provides that a utility must grant telecommunications carriers such as WinStar access to all rights of way owned or controlled by the utility. *Order* at ¶¶ 1119-1187. Analyzing this provision, the Commission correctly recognized the broad mandate of Section 224(f) when it stated that: "[t]his directive seeks to ensure that no party can use its control of the enumerated facilities and

^{2/} See WinStar May 20, 1996 Comments in this proceeding (at 2-6).

property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.” *Order* at ¶ 1123. The Commission further concluded that it believes “it unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC’s facilities. . . .” *Order* at ¶ 1157. The import of the Commission’s holdings thus appears simple: competitors have the same right as utilities (such as the incumbent LEC) to place attachments on rights of way or facilities that the utility owns or controls. This is a particularly broad mandate (as Congress intended). Unfortunately, in its *Order* the Commission failed to provide sufficient guidance on the one rights of way issue central to WinStar’s efforts to offer competitive local services — namely, access by wireless local exchange carriers to utility roofs and related riser conduit.

In its discussion of Section 224(f) and rights of way the Commission concluded that “the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis.” *Order* at ¶ 1143. As the Commission appropriately recognized, “there are simply too many variables to permit any other approach” other than a case-by-case basis. Similarly, the Commission was correct that the broader access to rights of way mandated by Section 224(f) will likely increase the number of disputes and “may cause small incumbent LECs and small entities to incur the need for additional resources to evaluate, process and resolve such disputes. . . .” *Id.* As a result, the Commission correctly concluded that it should not “enumerate a comprehensive regime

of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions. . . .” *Id.*

In the section of the *Order* particularly relevant to WinStar, the Commission noted that commenters were divided over whether a broad or narrow interpretation of “rights of way” should apply. In doing so, it noted that an overly broad interpretation could negatively affect building owners and managers, as well as small incumbent LECs, “by requiring additional resources to effectively control and monitor such rights-of-way located on their properties.” *Order* at ¶ 1185. Rather than addressing the specific right of way issues raised by WinStar (roofs and riser conduit) the Commission concluded only that Section 224(f)(1) likely does not mandate

that a utility make space available on the roof of its *corporate offices* for the installation of a telecommunications carrier’s transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under Section 251(c)(6).) The intent of Congress in Section 224 (f) was to permit cable operators and telecommunications carriers to ‘piggyback’ along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.

Order at para. 1185 (footnotes omitted) (emphasis supplied).

As noted above, WinStar believes that the Commission was correct to establish guidelines rather than comprehensive rules, however, in doing so the Commission failed to clearly establish the one guideline that would address the particularized concern of absolutely critical importance to WinStar and which is clearly mandated by Section 224(f). As a result, in contradistinction to the clear mandate of Section 224(f), incumbent LECs

repeatedly have sought to refuse WinStar access to roofs and riser conduit under their control, particularly at cost-based rates.

For this reason WinStar requests that the Commission clarify that utilities, including incumbent LECs, provide WinStar access to roof tops and related riser conduit under their control, at cost-based rates, in order for WinStar to install its 38 GHz radio equipment in furtherance of its transmission and distribution network. WinStar does not challenge the Commission's conclusion that the reasonableness of conditions limiting such access should be considered on a case-specific basis. However, there will be no basis for such case-specific adjudications if it is not clear as a general guideline that such access is mandated.^{3/}

As noted above, the Commission has firmly established fiber-based competitors' right to rights of way such as pole attachments and underground duct and conduit owned or controlled by a utility. Therefore, it would be unreasonable to discriminate against alternative technologies, such as WinStar's 38 GHz distribution networks, by not clarifying WinStar's right to roofs and related riser conduits — the true bottlenecks which impede wireless carriers' entry into local markets. Moreover, it is contrary to the explicit provisions

^{3/} The Commission has correctly recognized that the scope of a utility's ownership or control of an easement of right of way is a matter of state law and that the Commission "cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be confirmed." *Order* at ¶ 1179. By this petition WinStar is seeking only that the Commission firmly establish the general principle that WinStar is entitled to all rights of way owned or controlled by a utility, and that this includes roofs and related riser conduit useful and necessary for placement of its 38 GHz equipment.

of Section 224(f)(1) which mandates carriers' access to "any pole, duct, conduit or right-of-way." For a wireless local exchange carrier such as WinStar, access to roofs and risers by definition is access to the critical rights-of-way.

As the Commission has recognized, Section 224(f) mandates access "every time a telecommunications carrier ... seeks access to the utility facilities or property... with the limited exception allowing electric utilities to deny access" for insufficient capacity or for safety and reliability reasons. *Order* at ¶ 1123. Moreover it is contrary to the Commission's own broad interpretation of Section 224(f). For example, the Commission has concluded that Section 224(f) not only mandates access to a utility's existing rights of way, but that it requires utilities to exercise their powers of eminent domain to "expand an existing right of way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments." *Order* at ¶ 1181. Clearly, given the Commission's emphasis on promoting alternative technologies to serve local customers, it could not intentionally have interpreted broadly rights of way that serve wireline carriers and narrowly interpreted rights of way that serve alternative wireless local exchange carriers. The only reasonable interpretation is that the Commission failed to clearly enunciate the general principle that wireless carriers such as WinStar are entitled

to roofs and related riser conduit on the same basis that wireline carriers are entitled to poles, ducts and conduit.^{4/}

Moreover, at least certain of the incumbent LECs (such as US West) have stated in WinStar state certification proceedings that they rely upon microwave transmission facilities as an integral part of their transmission and distribution network. Thus, failure by the Commission to establish the principle that WinStar is entitled to roofs and related riser conduit would enable incumbent LECs to favor themselves over competitors in a blatantly discriminatory fashion that must not be sanctioned by the Commission.^{5/} The fundamental issue is to ensure that wireless carriers such as WinStar are able to piggyback upon the rights of way owned or controlled by the incumbent LECs in the manner clearly intended by Congress when it adopted Section 224(f). Failure by the Commission to clarify this general principle would result in the unintended effect that wireline carriers would have

^{4/} It is immaterial to WinStar whether such access is considered a right of way or access to an unbundled element, provided that such access is available at forward looking, cost-based, nondiscriminatory rates, and specifically at rates no higher than the Total Element Long Run Incremental Cost ("TELRIC") rates the Commission has established for interconnection and unbundled network elements.

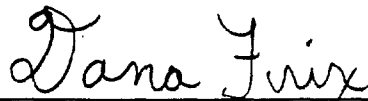
^{5/} Whether any specific utility or incumbent LEC has chosen to utilize microwave transmission media is irrelevant to the question of whether WinStar is entitled to access roofs and related riser conduit. As the Commission has recognize, the import of Section 224(f) is to ensure that "no party can use its control over the enumerated facilities and property to impede... the installation and telecommunications ... equipment by those seeking to compete...." *Order* at ¶ 123. Thus even where an incumbent LEC has chosen, as a matter of architecture and engineering, not to employ microwave radio equipment, it must allow competitors who choose to use such equipment access to the necessary rights of way.

virtually unfettered access to the rights of way necessary to develop their networks, while wireless local exchange carriers such as WinStar would be deprived of similar access.

CONCLUSION

For the foregoing reasons, WinStar requests that the Commission clarify that utilities must provide wireless competitive local carriers, such as WinStar, cost-based access to roofs and related riser conduit for the purpose of developing their local transmission and distribution facilities.

Respectfully submitted,



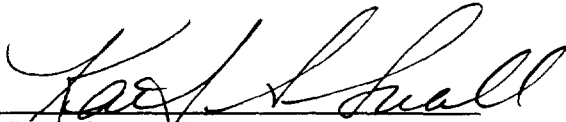
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Dated: September 30, 1996

CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of October, 1996, a copy of the Petition for Clarification or Reconsideration of WinStar Communications, Inc., was served on the following individuals either by hand-delivery ~~or~~ first-class postage prepaid mail.


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